2010

State of Utah v. James Errol Campbell : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. JAMES ERROL CAMPBELL, Defendant / Appellant.	Case No: 20100840-CA

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM THE JUDGMENT, SENTENCE AND COMMITMENT ON ONE COUNT OF POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, BEFORE THE HONORABLE JUDGE SAMUEL McVEY

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78A-4-103(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue 1: Whether the trial court should have granted Campbell's request to instruct the jury on possession of drug paraphernalia as a lesser-included to possession of a controlled substance. "Whether a jury instruction on a lesser included offense is appropriate presents a question of law." *State v. Spillers*, 2007 UT 13, ¶ 10, 152 P.3d 315 (*citing State v. Hamilton,* 827 P.2d 232, 238 (Utah 1992)). "'[W]henever a defendant requests a jury instruction on a lesser included offense,' specific legal standards must be followed and 'the trial court has no discretion in the matter.'" *State v. Payne*, 964 P.2d 327, 332 (Utah App. 1998) (*citing State v. Simpson,* 904 P.2d 709, 711 (Utah App.

1995)). "When considering whether a defendant is entitled to a lesser included offense jury instruction, we 'view the evidence and the inferences that can be drawn from it in the light most favorable to the defense.'" *Spillers*, 2007 UT 13, ¶ 10 (*citing State v. Crick,* 675 P.2d 527, 539 (Utah 1983)). "In addition, when the defense requests a jury instruction on a lesser included offense, the requirements for inclusion of the instruction 'should be liberally construed.'" *Spillers*, ¶ 10 (*citing State v. Hansen,* 734 P.2d 421, 424 (Utah 1986)). This issue was preserved by motion at trial and the trial court placed the rejected instruction into the record "that the issue [would] be preserved..." R. 202: 128-31.

CONTROLLING STATUTORY PROVISIONS

All controlling statutory provisions are set forth in full in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

James Campbell appeals from the judgment, sentence and order of commitment of the Honorable Samuel McVey, Fourth District Court, after he was convicted by a jury of possession of a controlled substance, a third degree felony.

B. Trial Court Proceedings and Disposition

On December 15, 2009 James Campbell was charged by information with possession of a controlled substance, a second degree felony, in violation of Utah Code Annotated § 58-37-8(2)(a)(i). R. 1. At the preliminary hearing on March 8, 2010 the State amended the charge to a third degree felony. R. 29, 200: 3. At the close of the

hearing, Judge Samuel McVey found probable cause and bound the charge over for trial. R. 200: 17.

On June 23, 2010 Campbell filed a demand that he be allowed to confront and examine any of the State's foundation and chain of custody witnesses regarding any scientific reports that the State intended to introduce into evidence at trial. R. 34.

On July 9, 2010 Campbell filed a motion to suppress statements that had been obtained from him in violation of his rights under the Fifth Amendment to the United States Constitution. R. 101-96. The State responded arguing that although Campbell was in custody when he made the statements the questions asked did not constitute interrogation for Fifth Amendment purposes. R. 112-09. On July 15, 2010 a suppression hearing was heard by Judge McVey. R. 201. On July 16, 2010 Campbell submitted an addendum to his suppression motion. R. 155-50. On that same day, Judge McVey issued a written order denying Campbell's motion to suppress concluding that statements made in response to the police asking whether Campbell had "any sharp objects on his person" were "non-investigatory... prompted by a concern for officer safety." R. 148-46.

On July 15, 2010 Campbell filed a motion in limine to exclude "any and all evidence and testimony related to field tests performed by officers on the suspected controlled substance in this case, and any and all testimony as to the results obtained from those field tests." R. 107-104. At trial the State did not offer any evidence related to the field test. R. 202: 91-92.

At trial defense counsel offered a proposed jury instruction for a lesser included

offense of possession of drug paraphernalia. R. 161, 202: 127-31. The trial court denied the request for the lesser included instruction finding that although there was evidence of drug paraphernalia and the "prosecution could have certainly added an offense... pertaining to the [items of paraphernalia]", "the Court cannot conclude that the -- that possession of heroin would have a lesser included offense of possession of heroin residue because it's still heroin... It's not paraphernalia. So it's not really a lesser included offense." R. 202: 130-31.

On July 20, 2010 a jury trial was held with Judge McVey presiding. R. 192-91, 202. After deliberating for two hours, the jury found Campbell guilty of possession of a controlled substance. R. 188, 202: 161.

On August 30, 2010 Campbell was sentenced to 0-5 years in the Utah State Prison. R. 194, 203: 5.

On September 9, 2010 Campbell filed a notice of appeal in Fourth District Court. R. 196.

STATEMENT OF FACTS

July 20, 2019 Jury Trial

A. Testimony of Officer Timothy Laursen

Provo City police officer Timothy Laursen testified that on December 10, 2009 he and other officers were trying to locate Nancy Peterson, who had several outstanding arrest warrants. R. 202: 86. On that day, they received information that Peterson was with James Campbell at a residence on Cherokee Lane in Provo. R. 202: 86-87.

Laursen and Officer Hubbard arrived at the residence at approximately 10:30 a.m. R. 202: 87. The door of the residence was opened for another individual who had arrived at the house just prior. Id. The officers were greeted by Ms. Disbrow, who resides there. R. 202: 87-88. They asked if Peterson and Campbell were at the house. R. 202: 88. Disbrow answered affirmatively and allowed them into the residence. R. 202: 88.

As Laursen and Hubbard walked up the stairs, Laursen observed both Peterson and Campbell. R. 202: 88. Peterson attempted to conceal herself by diving onto the floor. Id. Laursen drew his taser and ordered Campbell onto the ground as well. Id. Laursen then handcuffed Peterson and Hubbard did the same to Campbell. R. 202: 88-89.

Hubbard searched Campbell and gave Laursen a white contact lens case that had been removed from Campbell. R. 202: 89. Laursen opened the case lids outside the residence and found a brown cotton ball inside one of the case's compartments. R. 202: 90.

Laursen testified that based upon his experience, he believed that the brown substance on the cotton ball was heroin. R. 202: 92. He testified further that cotton is/can be used as a filter when heroin is taken into the body intravenously. R. 202: 93. Laursen placed both the case and the cotton ball in baggies and booked them as evidence. R. 202: 93. The cotton was subsequently sent to the crime lab for testing. Id. Campbell was arrested and taken to jail. R. 202: 96. Campbell was not tested for drugs by the officers. R. 202: 96.

B. Testimony of Officer Drew Hubbard

Officer Hubbard joined Laursen at a location in Provo to assist as a backup officer. R. 202: 100. After they arrived a couple of houses from the address they believed the warrant suspect was they observed a female approach the house and knock on the front door. R. 202: 100-01. Another female occupant opened the door and the officers asked the female if the individuals were there to which she "indicated they were upstairs. R. 202: 101. The officers entered the residence and were directed upstairs. R. 202: 101.

As Hubbard went up the stairs he observed two individuals, one of them being the female they were looking for. She started to move across the room quickly so the officers "[q]uickly went into the room. Commands were given. Both individuals laid down, and [Hubbard] arrested the male, James Campbell." R. 202: 101-02. He placed Campbell in handcuffs and asked Campbell if he had "any weapons or needles or things that would hurt me on his person." Id. Hubbard testified that Campbell replied, "he may have a needle on him." Id.

Hubbard searched Campbell and found a wallet and a contact lens case, but no needle. R. 202: 102, 106. He looked inside the case and found "two small balls—well, one or two small balls of cotton or some type of cottony material with brown residue on it."[1] R. 202: 103. Hubbard gave the case to Laursen. R. 202: 103, 104. Hubbard testified that he believed that the cotton contained heroin. R. 202: 104.

C. Testimony of Mandy Van Buren

Mandy Van Buren is employed by the Utah State Crime Lab. R. 202: 110. She

[1] At the suppression hearing, Hubbard testified that it was a single cotton ball. R.

tested the cotton ball and concluded that the brown residue contained heroin. R. 202: 114. Van Buren testified that the lab does not include the weight of the substance on their reports if it's less than 100 milligrams. R. 202: 119. A sample of the cotton was cut off, dunked in a solution and then tested. R. 202: 118-19. "There was not a weighable amount of residue" on the cotton but there was a "testable amount[.]" R. 202: 125. Accordingly, in this case, because the weight was less than 100 milligrams, she reported the heroin as "residue," which is a low level amount and not solid material. R. 202: 119. The residue containing heroin could not be separated from the cotton. R. 202: 119-20. The weight she listed in her "notes is the dark brown residue plus the cotton." R. 202: 120.

SUMMARY OF ARGUMENT

Campbell is not challenging the sufficiency of the evidence or the validity of his conviction for possession of a controlled substance. The case law seems to be clear that residue of a controlled substance is sufficient to prove possession so long as it is intentionally possessed knowing its narcotic character. Instead Campbell is asserting his due process right to have the jury instructed on possession of drug paraphernalia as a lesser included offense giving the jury the option of convicting him of the charged offense, acquitting on the charged offense and convicting on the lesser included offense, or acquitting him entirely. Campbell asserts that the trial court erred by refusing to instruct on the lesser included where the elements of possession and the elements of paraphernalia, in this case, overlap and where there was a rational basis in evidence to

acquit him of felony possession and convict him of misdemeanor paraphernalia. While it is true that there may have been sufficient evidence to prove both possession and paraphernalia charges, where the State proceeded with a felony possession case base solely upon the residue evidence, and where the drug paraphernalia statute clearly identifies residue as an optional element to prove an object is drug paraphernalia, Campbell was entitled to argue to the jury that possession of the cotton and residue constituted the crime of paraphernalia and not the crime of possession of a controlled substance.

ARGUMENT

THE TRIAL COURT SHOULD HAVE GRANTED CAMPBELL'S REQUEST TO INSTRUCT THE JURY ON POSSESSION OF DRUG PARPHERNALIA AS A LESSER INCLUDED OFFENSE

Following the close of the State's case defense counsel asked the court to instruct the jury on possession of paraphernalia as a lesser included offense, even though the crimes have different elements, based on the principle of defendant requested lesser-included as explained in *State v. Carruth*, 1999 UT 107, 993 P.2d 869, because the State's case lacked evidence to support the required intent element of possession of a controlled substance. R. 202: 126-28. The State objected to the instruction arguing that the evidence spoke for itself on the intent element and that the lesser included should not be provided because there was no reason "the jury would find the defendant not guilty of the main charge and yet guilty of the lesser included." R. 202: 129-30. Defense counsel

replied that there was a reasonable basis for the jury to convict on the lesser included because the same facts could support both crimes. R. 202: 130.

The trial court concluded that because the residue on the cotton ball was heroin it was not paraphernalia and therefore not a lesser included offense. R. 202: 131. The court added The trial court denied the request for the lesser included instruction finding that although there was evidence of drug paraphernalia and that the "prosecution could have certainly added an offense... pertaining to the [items of paraphernalia]", "the Court cannot conclude that the -- that possession of heroin would have a lesser included offense of possession of heroin residue because it's still heroin... It's not paraphernalia. So it's not really a lesser included offense." R. 202: 130-31. The court denied the request and placed the proposed instructions in the record.

Campbell now asserts that the trial court erred by refusing to allow the jury to consider the charge of possession of a controlled substance as a lesser included offense because, under the facts presented, the facts "tend to prove elements of more than one statutory offense" and there was a "rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *State v. Baker*, 671 P.2d 152 (Utah 1983) (*citing* UTAH CODE ANN. § 76-1-402(4)). Campbell asks this Court to reverse the trial court's decision to preclude the lesser included instruction and order new trial permitting Campbell to present his defense of the lesser included to a jury.

A. Relevant Law

Lesser included offenses

According to Utah Code Annotated § 76-1-402, "A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when: (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged..." This statute prohibits the court from entering a conviction upon both the charged offense and any lesser included offense based on the same facts. The statute continues, "[t]he court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." UTAH CODE ANN. § 76-1-402(4). This statute has been interpreted in the context of a defendant requested lesser included jury instruction in several Utah cases. The Utah Supreme Court set the "standard" in *State v. Baker*, 671 P.2d 152 (Utah 1983). *State v. Powell*, 2007 UT 9, ¶ 24, 154 P.3d 788.

In *Baker* the Court examined a case where the defendant had been charged and convicted of burglary. On appeal to the Utah Supreme Court the defendant argued that the "trial court erred in refusing to instruct the jury regarding the offense of criminal trespass" because he asserted criminal trespass was a lesser included offense. *Baker*, 671 P.2d 152, 154. The evidence at trial showed the defendant climbed a fence, broke a window, entered a building, broke into a locked desk, and then concealed himself in a closet until being discovered by the police. *Baker*, at 154.

In its analysis the Supreme Court examined "two standards used by trial and appellate courts in determining when to instruct a jury regarding lesser included offenses." *Id.*, at 154. The first standard requires a court to give a lesser included instruction "if any reasonable view of the evidence would support such a verdict." *Id.*, at 154 (*citing State v. Gillian*, 463 P.2d 811, 812 (Utah 1970)). The second standard required the a court to give a lesser included instruction where "the lesser offense must be a necessary element of the greater offense and must of necessity be embraced within the legal definition of the greater offense and be a part thereof." *Id.*, at 154-55 (*citing State v. Woolman*, 33 P.2d 640, 645 (Utah 1935)).

The Court then clarified these two standards by distinguishing them by which party is seeking the instruction. The second standard, or the "'necessarily included offense' should be limited to cases where the prosecution requests the instruction" while the "evidence based" standard required by the defendant's Due Process Rights should be applied when the defendant requests the instruction. *Id.*, at 156-58. The Court then demonstrated how this evidence based standard is incorporated into Utah Code Annotated § 76-1-402. The statute says a court is not "obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." UTAH CODE ANN. § 76-1-402(4). The relevant portion of the code defines an included offense as one "established by proof of the same or less than all the facts required to establish the commission of the offense charged." *Baker*, at 158 (citing UTAH CODE ANN. § 76-1-402(3)(a).

The Court elaborated, "[w]here two offenses are related because some of their statutory elements overlap, and where the evidence at the trial of the greater offense includes some or all of those overlapping elements, the lesser offense is an included offense." *Baker*, at 159. And when "the evidence offered provides a 'rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense" the court is obligated to instruct the jury on the lesser offense. *Baker*, at 159. Because the Court in *Baker* did "not believe that the evidence was ambiguous or subject to any alternative interpretation the required the court to instruct on a lesser offense" the Supreme Court upheld the trial court's refusal. The Court found that there was "not a sufficient quantum of evidence" supporting the alternative theories presented by the defendant on appeal because, although his arguments challenge the sufficiency of the evidence to convict of the charged offense, he failed to show evidence to support a "rational basis for a verdict acquitting [him] of the offense charged *and* convicting him of the included offense." *Baker*, at 160 (citing UTAH CODE ANN. § 76-1-402(4)).

The Utah Supreme Court applied the *Baker* standard again in *State v. Velarde*, 734 P.2d 449 (Utah 1986). There the defendant was convicted of second degree murder and appealed his conviction claiming the trial court "erred by refusing to instruct the jury regarding the offenses of simple assault, aggravated assault, and negligent homicide" claiming that "these offenses are lesser included offenses of second degree murder as it was charged in [his] case." *Velarde,* 734 P.2d 449, 450. The Court reitereated that "[i]f a defendant requests a lesser included instruction… an evidence-based standard controls" and "the trial court must determine whether the offense is established by proof of the

same or less than all the facts required to establish the commission of the charged offense" and then, "if the evidence is ambiguous and susceptible to alternative explanations, the trial court must give the lesser included offense instruction if any one of the alternative interpretations provides both a rational basis for a verdict acquitting the defendant of the charged offense and convicting him of the included offense." *Velarde*, at 451. The Court also recalled that the *Baker* standard "does not allow the court in jury cases to weigh the credibility of the evidence offered by the defendant in support of his or her request..." but "only whether there is a sufficient quantum of evidence presented to justify charging the jury with the defendant's requested instruction." *Id.*, at 451.

At trial the defendant presented evidence admitting to playing a role in the assault on the victim, that he and his friends carried sticks into the fight, that he struck the victim with his fists, and that his partners struck the victim with their sticks. *Id.*, at 451. The Court found that "[l]ooking at the evidence in a light most favorable to the defendant... [u]nder no rational view of the evidence could the defendant's conduct constitute gross negligence" which he needed to qualify for an instruction on negligent homicide. *Id.*, at 453. However, when the Court examined the defendant's claims to an aggravated assault instruction, because he offered evidence through his testimony about his lack of intent to cause death or serious bodily injury, even if his testimony was unconvincing, "[t]he trial court was under a duty to give defendant's requested lesser included offense instruction under the dictates of *Baker*." *Id.*, at 454.

This Court applied the *Baker* standard in *State v. Payne*, 964 P.2d 327 (Utah App. 1998) where the defendant was convicted of lewdness involving a child. The defendant

appealed his conviction arguing that the trial court's refusal to instruct the jury on a lesser included offense of child abuse was erroneous. *Payne*, 964 P.2d 327, 329. The facts at trial demonstrated that the defendant, while wrestling with the child victim, held the victim upside down by one leg and rubbed the victim's genital area, over the clothing, and then fondled the victim's genitals under her clothing while watching a movie. *Payne*, at 329.

At trial the court instructed the jury that it could find [the defendant] guilty or not guilty of sexual abuse of a child, or the lesser included offense of lewdness involving a child. The defendant objected, arguing that the jury should have also been instructed on gross lewdness and on child abuse as lesser included offenses. *Id.*, at 331. The trial court refused to give those instructions and the defendant appealed that refusal. *Id.*, at 331.

In its analysis this Court reviewed the *Baker* standard to the child abuse requests and noted that "some crimes have multiple variations, so that a greater-lesser relationship exists between some variations of these crimes, but not between others." *Payne*, at 333 (*citing State v. Simpson*, 904 P.2d 709, 713 (Utah App. 1995) (internal cite omitted)). Because sexual abuse could be proved by either intent to cause emotional or bodily pain or by intent to arouse or gratify sexual desire, and because child abuse can be proved by intentional infliction of a condition which imperils a child's health or welfare, there is a greater lesser relationship, even though the two elements of the two crimes are not strictly analogous. *Id.*, at 333. The Court also found that when examining whether or not there the evidence presented a rational basis for

acquittal on the charged crime and conviction on the lesser included (the second *Baker* factor) "trial courts have little or not leeway." *Id.*, at 333. Because the defendant introduced evidence that the injuries sustained to the victims genital area could have been caused by the wrestling creating a rational basis for conviction on the lesser included offense and acquittal on the greater offense, the defendant was entitled to a lesser included instruction on child abuse. *Id.*, at 334.

The Court eventually found that the trial court's error was harmless because of it found there was no substantial likelihood of a different outcome, even though the trial court should have given the lesser included instruction. *Id.*, at 335. The Court focused on the strength of the victim's testimony, the eyewitness testimony, and the physical evidence described by the expert witness. Together these facts made it so unlikely that the jury would have acquitted the defendant of sexual abuse even if it had the option of convicting the defendant of child abuse. *Id.*, at 334-35.

In *State v. Powell*, 2007 UT 9, ¶¶ 1-4, 154 P.3d 788 the defendant was convicted of aggravated burglary and attempted murder for entering a woman's hotel room, putting a gun to her head, pulling the trigger causing a misfire, striking the woman with the gun, fleeing the room, and then again pointing the gun at the woman and attempting to fire as she chased after him. At trial the defendant presented a defense that he had been misidentified by the victim and that presented an alibi for the time of the offense. *Powell*, 2007 UT 9, ¶ 8-9. He also requested to have the jury instructed on the lesser included offenses of assault and aggravated assault. *Powell*, at ¶ 24. The Supreme Court applied the *Baker* standard and found that although attempted murder, assault, and aggravated

assault have overlapping statutory elements and the evidence offered at trial tended to prove elements of the lesser offenses (making assault and aggravated assault lesser included offenses of attempted murder), because there was "no rational basis in the evidence presented at trial for a verdict acquitting [the defendant] of attempted murder and convicting him of the lesser included offenses..." *Id.*, at ¶ 25-26. The Court found that because the defendant's did not contest the details of the attack which clearly supported attempted murder but rather focused on his complete innocence by alibi and misidentification there was no rational basis for conviction on the lesser offenses. *Id.*, at ¶ 28.

In *State v. Spillers*, 2007 UT 13, 152 P.3d 315 the defendant was charged and convicted of first degree murder. He appealed his conviction claiming he was entitled to jury instructions on both extreme emotional distress manslaughter and imperfect legal justification manslaughter. *Spillers*, 2007 UT 13, ¶ 1. The Court of Appeals granted his appeal and the Utah Supreme Court granted the State's petition for certiorari to determine whether or not the evidence required the trial court to instruct the jury on the affirmative defenses.[2] *Spillers*, at ¶¶ 1, 9. Neither party contested the first prong of the *Baker* standard so the Court only considered whether there was "a rational basis to acquit Defendant of murder and convict him of manslaughter." *Spillers*, at ¶ 12.

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[2] The State contended that because the defendant had requested instructions on affirmative defenses, and not lesser included offenses, the *Baker* standard should not apply, however the Court found that the standards are "indistinguishable" and "[i]n either case, a defendant is entitled to an instruction 'if there is any reasonable basis in evidence.'" *Spillers*, at fn. 1 (*citing State v. Torres*, 619 P.2d 694, 695 (Utah 1980)).

On the matter of extreme emotional distress manslaughter the Court considered the evidence presented and found, despite the State's assertion that defendant failed to prove extreme emotional distress, that "[a] jury could infer Defendant's mental state from the testimony of Defendant and others that supported his theory of the case... Based on the entirety of the evidence at trial, a jury could choose to believe Defendant's version of events and conclude that Defendant was experiencing extreme emotional distress at the time of the shooting for which there was a reasonable explanation or excuse." *Id.*, at ¶¶ 19-20. "As long as the evidence presented at trial supports a defendant's theory of the crime and provides a rational basis for a verdict on the lesser included offense, a defendant is entitled to the jury instruction if he requests it." *Id.*, at ¶ 19.

Possession of a Controlled Substance and Drug Paraphernalia

Conviction for possession of a controlled substance, pursuant to Utah Code Annotated § 58-37-8(2)(a)(i), requires proof that a person knowingly and intentionally possessed or used a controlled substance. This statute does not contain any reference to a minimum amount required to support a conviction for possession. Utah cases have addressed this issue and have held that a conviction does not require proof of any amount so long as the possession is shown to be knowing and intentional.

In *State v. Winters*, 396 P.2d 872, 873-74 (Utah 1964), the defendant was convicted of possession of narcotic drugs after a white powder substance, which tested positive for heroin, was found in his jail cell. The defendant appealed his conviction contending, among other things, "the trial court erred in refusing to instruct the jury that,

in order to convict, the amount of narcotic drug possessed must be found to be a useable amount." *Winters*, 396 P.2d 872, 875. This claim arose from the fact that, although the state chemist testified the powder contained heroin he did not know how much heroin the powder contained. *Winters*, 396 P.2d at 873. The Utah Supreme Court rejected this claim and found that "[t]he determinative test is possession of a narcotic drug, not the useability (sic) of a narcotic drug." *Winters*, at 875.

This Court in *State v. Warner*, 788 P.2d 1041, 1041-42 (Utah App. 1990) revisited the *Winters* rule in a case where the defendant was convicted of possession of a controlled substance for residue in a vial found in his possession following his arrest. The defendant appealed his conviction claiming the trial court erred in determining that the residue of methamphetamine found on the vial was sufficient to convict him of possessing a controlled substance..." *Warner*, 788 P.2d 1041, 1042. "At trial, the State's chemist admitted that the quantity of methamphetamine found in the vial was insufficient to cause any physical effect on a person." *Warner*, 788 P.2d at 1042. The defendant claimed because the possession statute did not specify the amount of controlled substance required for conviction, "the amount possessed must be sufficient to cause a physical effect on a person," otherwise known as the useable amount test. *Warner*, at 1042-43.

This Court cited *Winters* and found that the trial court did not err in refusing to interpret the possession statute to "require possession of a sufficient quantity of illegal substance to cause a physical effect" because of the holding in *Winters*. *See also State v. Vigh*, 871 P.2d 1030 (Utah App. 1994) (evidence of cocaine residue sufficient to support conviction for cocaine possession).

Conviction for possession of drug paraphernalia, pursuant to Utah Code Annotated § 58-37a-5(1)(a), requires proof that a person use, or possess with intent to use any drug paraphernalia to inject, ingest or otherwise introduce a controlled substance into the human body. A non-exhaustive list of drug paraphernalia items is contained in Utah Code Annotated § 58-37a-3 and includes kits used to plant, grow, manufacture or produce controlled substances, devices used to increase the potency of controlled substances, devices used to analyze purity of controlled substances, items used to weigh controlled substances, diluents used to cut controlled substances, sifters used to remove impurities from marijuana, items used to mix controlled substances, containers used to store controlled substances, and needles or objects used to inject or ingest controlled substances. Utah Code Annotated § 58-37a-4 provides factors to determine whether an object is paraphernalia. These factors include "the existence of any residue of a controlled substance on the object..." UTAH CODE ANN. § 58-37a-4(5). Thus, paraphernalia is separate from controlled substances but the presence of controlled substances and the relationship an object has to a controlled substance can help a fact finder determine whether an object constitutes paraphernalia.

In *State v. Sorenson*, 2003 UT App 292, *1, the defendant claimed on appeal that he could not be "charged with both possession of methamphetamine and possession of paraphernalia because the methamphetamine charge stems from the presence of residue on the items the prosecution claim[ed were] paraphernalia." Presumably he argued that the residue could not both be a controlled substance for purposes of possession as well as proof that the objects were paraphernalia, that it must be one or the other. This Court

disagreed and found that because the "items could be considered paraphernalia even without the residue because of the presence of residue is a factor, rather than a requirement, used in determining whether an item is paraphernalia." *Soreneson*, 2003 UT App 292, *1. The Court found "residue can form the basis for the methamphetamine charge, independent of the paraphernalia charge." *Id.*

Several relevant rules can be extracted from the above cited case law, first, evidence of residue of a controlled substance can be sufficient to support a conviction for possession of a controlled substance even where the residue is not a useable amount. Second, residue of a controlled substance can be used both as a factor to prove an object constitutes drug paraphernalia and as independent evidence of possession of a controlled substance. And third, when a defendant requests an instruction on a lesser included, and the two elements of the two offenses overlap, if there is a rational basis for the jury to acquit on the charged crime and convict on the included crime, the defendant is entitled to the instruction.

B. Application

In this case, the elements of possession of a controlled substance and the elements of possession of drug paraphernalia overlap making paraphernalia an included offense.

In *Baker* criminal trespass was found to be an included offense to burglary because both statutes required proof that the defendant entered or remained unlawfully in a building. *Baker*, 671 P.2d 152, 159-60. Criminal trespass is not a necessary included offense to burglary but instead is an included offense based on the evidence based

approach. In *Payne* child abuse was found to be an included offense to sexual abuse of a child because "[a]lthough there are variations in the elements of these two offenses, a greater-lesser relationship clearly exists between some of these variations." *Payne*, 964 P.2d 327, 333.

Here, possession of a controlled substance was proved in part by the fact that there was a residue of heroin on the cotton ball. Had the trial court allowed the instruction on paraphernalia it would have been proved in part by the fact that there was heroin residue on the cotton ball. "In determining whether an object is drug paraphernalia, the trial of fact, in addition to all other logically relevant factors, should consider:... the existence of any residue of a controlled substance." UTAH CODE ANN. § 58-37a-4. According to *Baker*, because "the same facts tend to prove elements of more than one statutory offense... the offenses are related under ¶ 76-1-402." *Baker*, at 158. Even though some of the elements of paraphernalia have no equivalent to the elements of possession, because under the variation of paraphernalia at issue by theses facts, the charge of paraphernalia would be "established by proof of the same or less than all the facts required to establish the commission of" possession, paraphernalia is an included offense. UTAH CODE ANN. § 76-1-402(3).

In this case there was a rational basis for the jury to acquit Campbell of possession of heroin and convict him of possession of drug paraphernalia.

"The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." UTAH CODE ANN. § 76-1-402(4).

On this point trial counsel did a very good job, given the fact that the trial court prevented her from instructing the jury on paraphernalia. Counsel cross examined the officers who testified that the cotton ball was used to "filter out any impurities and things other than heroin that the individual wanted to introduce into their body." R. 202: 93. They testified that the cotton would filter out "[a]nything foreign, anything other than the heroin…" and that it would "clean the impurities or the large objects from getting inside the needle." R. 202: 96, 105. See also R. 202: 107-08 ("From my understanding is that the cotton balls are used to filter a substance, which heroin is broken down into through heat or liquid, and they get that into the needle, they need to remove the impurities so it can No. 1, get into the needle and not cause problems. Number 2, you don't want a chunk getting into your veins, I'm assuming, and they use cotton or they use something that will stop that transmission of those larger objects into the syringe."). The combination of this testimony suggests that the residue left in the cotton, while demonstrating the cotton's use as paraphernalia, does not represent the part of the heroin that is injected or used by the person. What is left in the cotton is the impurities in the heroin.

Counsel then cross examined the lab technician after she testified that the residue in the cotton was tested and "matched heroin." R. 202: 114. Van Buren testified she weighed the sample and, because it was "such a low level", even the balances she used could not accurately weight it. R. 202: 119. She testified that the heroin she tested "wasn't a solid material" and merely a residue that could not be separated from the cotton. R. 202: 119-20. When this testimony is added to the information received from the police the inference can be made that although there is no minimum requirement for

possession of a controlled substance, in this case there was such a small amount of heroin that the only use of the fact that heroin was present was as evidence that the cotton constituted paraphernalia.

Counsel then argued in closing that what was really in evidence was a "dirty cotton ball" that at a molecular level contained trace amounts of heroin, and that the police testified was used to strain the impurities out of heroin before the heroin was injected. R. 202: 155. Counsel emphasized the absolutely minimal amount of heroin at issue to infer that Campbell may not have knowingly or intentionally possessed heroin based on the fact that he likely believed it had all been used up.

This inference would have been supported by the argument counsel made in closing about the fact that much of U.S. currency in circulation has cocaine residue on it. While one would be surprised if, after having been made aware that the money in one's wallet in fact had traces of drugs on it one could be prosecuted for knowingly and intentionally possessing a controlled substance. Of course this is an extreme example but it illustrates the point counsel could have and likely would have argued to the jury, namely, that at some point the amount of controlled substance in one's possession does become relevant to the crime of charge of possession even if legally there is no minimum requirement. It would have been perfectly reasonable for counsel to encourage the jury, and for the jury to have

The jury could have accepted this argument and found that because there was such a small amount of heroin, an amount that could neither be weighed or extracted from the cotton, Campbell did not knowingly possess it and instead find that he knowingly

possessed paraphernalia used to inject heroin as proved by the existence of the trace amounts of heroin residue. That is a perfectly rational basis, supported by the evidence, for the jury to have acquitted Campbell of possession and to have convicted him of drug paraphernalia. The jury likely believed that Campbell used heroin at some earlier time, and they likely believed that he used the cotton ball to strain it. They could have believed, as appeared to be the case, that Campbell believed he no longer possessed any heroin.

In the cases discussed above Utah courts have demonstrated instances of a rational basis to acquit on the charged offense and convict on the included offense. In *Baker* the Court found that the evidence was not "subject to any alternative interpretation that required the court to instruct on the lesser offense" because the defendant, having been charged with burglary, was found by the police in the storage closet of a locked building on the morning immediately following the break-in, where the window and a lock on the desk had been broken with the contents scattered. *Baker*, 671 P.2d 152, 154, 159. The Court found that the only disputed element between burglary and the included offense of criminal trespass was the defendant's intent, which was inferred from circumstantial evidence. Because the defendant did not present any evidence upon the specific intent required for the criminal trespass charge the Court found he had not satisfied the 'rational basis for a verdict acquitting on the greater and convicting on the lesser' requirement. *Baker*, at 160.

In *Payne* the key to this second set of *Baker* factors was that, although the defendant's claim that the victim's injuries were caused by roughhousing rather than by

improper touching was not compelling, it would have permitted the jury to infer the touching was child abuse and not sexual abuse. Because the court is not allowed to "weigh the credibility of the evidence offered by a defendant in support of his or her request for a lesser included", even though this Court may not have been convinced of the validity of the theory it was obligated to find the evidence provided a rational basis for a verdict acquitting him of sexual abuse or lewdness involving a child and convict him of child abuse.

In *Velarde* the Court found there was no way for the jury to have viewed the evidence and acquitted him of second degree murder and yet convict him of negligent homicide. *Velarde*, 734 P.2d 449, 453. Although there was evidence which would have allowed the jury to find the killing was reckless, the Court found there was no rational basis support a verdict for negligence. The key to this distinction, it seems, is that the defendant admitted that he used means likely to produce death or serious bodily injury and that he committed an aggravated assault. His admission to using such force and engaging in such conduct demonstrated that he was aware of the substantial and unjustified risk and thus could not support a theory that he was not but should have been aware of the risk as required by criminal negligence.

In *Powell* "[t]he State's evidence overwhelmingly demonstrated that Powell attacked Ellis with the specific intent to kill. Ellis testified that Powell put the gun to her head, threatened her life, and then attempted to fire the gun." *Powell*, 2007 UT 9, ¶ 28. "Powell presented no evidence contesting the details of the attack" and therefore did not

provide a rational basis upon which the jury could have concluded that he was not guilty of attempted murder but instead was guilty of aggravated assault. *Powell*, at ¶ 31.

In *Spillers* the Court concluded that the evidence provided a rational basis "to warrant the extreme emotional distress manslaughter instruction" because, even though the State presented evidence the defendant was acting rationally, there was also evidence that he was not acting rationally and that ambiguity was a question to be determined by the jury. *Spillers*, 2007 UT 13, ¶ 18. Because the jury could have chosen "to believe Defendant's version of events" and reach a verdict of guilt on the lesser included the defendant was entitled to a jury instruction on the lesser included offense. *Spillers*, at ¶¶ 20-21.

Unlike the defendant in *Baker*, the jury here did hear evidence supporting all the elements of paraphernalia. The jury heard that Campbell possessed the residue stained cotton, that the cotton was likely used to strain or filter heroin before it was injected into the human body and that the heroin found within the cotton was such a minuscule amount that it was merely the waste product of heroin use, an amount Campbell may not have knowingly possessed. Much like the defendant in *Payne*, Campbell has presented and argued a good reason for the jury to have acquitted him of possession and convicted him paraphernalia. Even if this Court does not believe the lab technician when she said the heroin residue was so slight it could not be separated from the cotton or the police when they testified that what is left in the cotton is just the waste, this Court should conclude that there is a rational basis to support Campbell's paraphernalia instruction.

Unlike the defendant in *Velarde*, Campbell is not presenting theories for multiple but conflicting included offenses. Campbell has maintained consistently that the conduct he engaged in was possession of paraphernalia. Nothing in his defense to the charge of possession of heroin interferes or contradicts the theory that the residue in the cotton demonstrates the cotton was paraphernalia. Unlike the defendant in *Powell*, Campbell did present evidence to support the lesser included conviction. Despite the trial court's assertion that the "residue is heroin... [i]t's not paraphernalia... [s]o it's not really a lesser included offense" there was a rational basis for the jury to conclude Campbell did not knowingly and intentionally possess heroin but did possess drug paraphernalia. R. 202: 131.

As explained in *Baker*, "where proof of an element of the crime is in dispute, the availability of the 'third option" – the choice of conviction of a lesser offense rather than conviction of the greater or acquittal – gives the defendant the benefit of the reasonable doubt standard." *Baker*, 671 P.2d 152, 157. Campbell now asserts that this benefit is closely tied to his due process right to a fair trial and that while his "right to a lesser included offense is limited by the evidence presented at trial", where, according to the evidence-based standard, there was a rational basis in evidence to support conviction upon the included offense, he was entitled to the benefit of the reasonable doubt and should have been given the opportunity to try the included offense of paraphernalia to the jury. Because there was a sufficient quantum of evidence supporting the paraphernalia offense, because the evidence of possession was ambiguous and susceptible to alternative interpretations, according to both the officers' and the technician's testimony, "a jury

question exists and the court must give a lesser included offense instruction at the request of the defendant." *Baker*, at 159.

The trial court's error was not harmless because there is a reasonable likelihood of a more favorable result.

Finally, in order to prevail in this case Campbell must demonstrate that the trial court's error in refusing to instruct the jury on the included offense of paraphernalia was not harmless. *See Payne*, 964 P.2d 327, 334 ("[E]ven if a trial court errs in refusing to instruct a jury on a lesser included offense, reversal is appropriate only where the error is prejudicial."). In order to prove a harmful error "the likelihood of a different outcome must be sufficiently high to undermine the confidence in the verdict." *Payne*, 964 P.2d 327, 334 (*citing State v. Jacques*, 924 P.2d 898, 902 (Utah App. 1996)).

Payne is the only case, of those cited above, which directly addresses the issue of harmless error in the lesser included offense circumstance because the rational basis upon which the charge offense is acquitted and the included offense is convicted demonstrates the reasonable likelihood of a more favorable result. In *Payne*, despite the fact that the Court found there was a rational basis upon which the defendant could have been acquitted for the greater offense and convicted of the included offense, the Court found the trial court's error harmless because the defendant presented no contradictory evidence to the facts that the victim testified he had rubbed her genital area both outside and inside her clothing, that an independent witness corroborated the victim's account, and each of the those testimonies corroborated the physical evidence presented by the doctor who examined the victim. *Payne*, at 334. Because the jury would have had to "reject the

consistent testimony of two witnesses who independently registered their concerns with adults immediately after the incident" "in favor of mere inferences that are conceivable from the evidence but are by no means compelled by it" there was "no reasonable likelihood that, had the court properly instructed it on child abuse, the jury would have convicted Payne of this offense" rather than the greater offense. *Payne*, at 335. In order to accept the defendant's theory the jury would have had to believe that the defendant repeatedly touched the child's genitals during wrestling, causing injury, not based upon testimony but based on inference meanwhile rejecting seemingly credible testimony to the contrary.

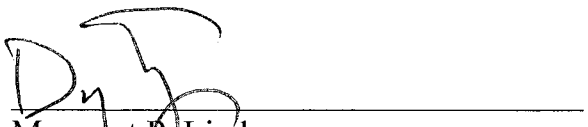
Unlike *Payne*, Campbell's alternative theory is not based on inference, it is based upon the direct testimony of the State's witnesses. Campbell is not asking the jury to reject any of the State's evidence. Rather, he is asking only that the jury, after having seen the evidence, be able to see the alternative law, to see what the charge of paraphernalia is and to have the chance to convict him upon a crime which more closely reflect the facts presented. It is very likely that, had the jury had the opportunity to convict on paraphernalia, they would have acquitted Campbell of possession and convicted him of paraphernalia. That likelihood of a better result makes the trial court's error harmful and makes this case one worthy of reversal and remand for a new trial.

CONCLUSION AND RELIEF SOUGHT

Because the trial court erred in failing to instruct the jury upon the lesser included offense of possession of drug paraphernalia, where according to the evidence presented

the elements of the two offenses overlap and there was a rational basis for the jury to acquit Campbell of possession of a controlled substance and convict him of possession of drug paraphernalia, this Court should reverse Campbell's conviction and remand to the trial court for a new trial.

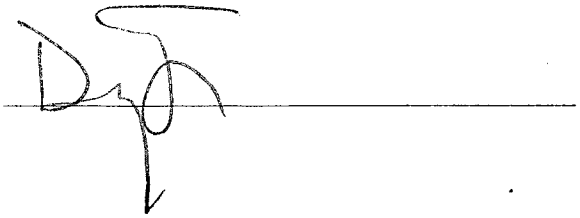
Respectfully submitted this 10th day of June, 2011.



Margaret P. Lindsay
Douglas J. Thompson
Counsel for Appellant

CERTIFICATE OF MAILING

I herby certify that I mailed a true and correct copy of the foregoing postage prepaid to the Utah State Attorney General, Appeals Division, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 10th day of June, 2011.



Addenda

Utah Code Annotated § 58-37-8
Possession of controlled substance

Utah Code Annotated § 58-37a-3
Drug paraphernalia defined

Utah Code Annotated § 58-37a-4
Considerations in determining whether object is drug paraphernalia

Utah Code Annotated § 58-37a-5
Drug paraphernalia, Unlawful acts

Utah Code Annotated § 76-1-402
Included offenses

West's Utah Code Annotated Currentness
Title 58. Occupations and Professions
Chapter 37. Utah Controlled Substances Act (Refs & Annos)
§ 58-37-8. Prohibited acts--Penalties

(1) Prohibited acts A--Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance or a counterfeit of a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance or a counterfeit of a substance classified in Schedule III or IV, or marijuana, is guilty of a

third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance or a counterfeit of a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B--Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of the person's professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the

amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (2)(h) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in the person's body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(h) A person who violates Subsection (2)(g) by having in the person's body:

(i) a controlled substance classified under Schedule I, other than those described in Subsection (2)(h)(ii), or a controlled substance classified under Schedule II is guilty of a second degree felony;

(ii) marijuana, tetrahydrocannabinols, or equivalents described in Subsection 58-37-4(2)(a)(iii)(S) or (AA) is guilty of a third degree felony; or

(iii) any controlled substance classified under Schedules III, IV, or V is guilty of a class A misdemeanor.

(i) A person is guilty of a separate offense for each victim suffering serious bodily injury or death as a result of the person's negligent driving in violation of Subsection 58-37-8(2)(g) whether or not the injuries arise from the same episode of driving.

(3) Prohibited acts C--Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent oneself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or

reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D--Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in or on the grounds of a library;

(ix) within any area that is within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i), (ii), (iv), (vi), and (vii);

(x) in the presence of a person younger than 18 years of age, regardless of where the act occurs; or

(xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

(b)(i) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this Subsection (4) would have been a first degree felony.

(ii) Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense. This Subsection (4)(c) does not apply to a violation of Subsection (2)(g).

(d)(i) If the violation is of Subsection (4)(a)(xi):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(xi).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6) For purposes of penalty enhancement under Subsections (1)(b) and (2)(c), a plea of guilty or no contest to a violation of this section which is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

(7) A person may be charged and sentenced for a violation of this section, notwithstanding a charge and sentence for a violation of any other section of this chapter.

(8)(a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(10) This section does not prohibit a veterinarian, in good faith and in the course of the veterinarian's professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under the veterinarian's direction and supervision.

(11) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under this chapter who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of the officer's employment.

(12)(a) Civil or criminal liability may not be imposed under this section on any Indian, as defined in Subsection 58-37-2(1)(v), who uses, possesses, or transports peyote for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion as defined in Subsection 58-37-2(1)(w).

(b) In a prosecution alleging violation of this section regarding peyote as defined in Subsection 58-37-4(2)(a)(iii)(V), it is an affirmative defense that the peyote was used, possessed, or transported by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.

(c)(i) The defendant shall provide written notice of intent to claim an affirmative defense under this Subsection (12) as soon as practicable, but not later than 10 days prior to trial.

(ii) The notice shall include the specific claims of the affirmative defense.

(iii) The court may waive the notice requirement in the interest of justice for good cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.

(d) The defendant shall establish the affirmative defense under this Subsection (12) by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

(13) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

CREDIT(S)

Laws 1971, c. 145, § 8; Laws 1972, c. 22, § 1; Laws 1977, c. 29, § 6; Laws 1979, c. 12, § 5; Laws 1985, c. 146, § 1; Laws 1986, c. 196, § 1; Laws 1987, c. 92, § 100; Laws 1987, c. 190, § 3; Laws 1988, c. 95, § 1; Laws 1989, c. 50, § 2; Laws 1989, c. 56, § 1; Laws 1989, c. 178, § 1; Laws 1989, c. 187, § 2; Laws 1989, c. 201, § 1; Laws 1990, c. 161, § 1; Laws 1990, c. 163, §§ 2, 3; Laws 1991, c. 80, § 1; Laws 1991, c. 198, § 4; Laws 1991, c. 268, § 7; Laws 1995, c. 284, § 1, eff. May 1, 1995; Laws 1996, c. 1, § 8, eff. Jan. 31, 1996; Laws 1997, c. 64, § 6, eff. May 5, 1997; Laws 1998, c. 139, § 1, eff. May 4, 1998; Laws 1999, c. 12, § 1, eff. May 3, 1999; Laws 1999, c. 303, § 1, eff. May 3, 1999; Laws 2003, c. 10, § 1, eff. May 5, 2003; Laws 2003, c. 33, § 6, eff. May 5, 2003; Laws 2004, c. 36, § 1, eff. March 15, 2004; Laws 2005, c. 30, § 1, eff. May 2, 2005; Laws 2006, c. 8, § 4, eff. May 1, 2006; Laws 2006, c. 30, § 1, eff. May 1, 2006; Laws 2007, c. 374, § 1, eff. April 30, 2007; Laws 2008, c. 295, § 1, eff. May 5, 2008; Laws 2009, c. 214, § 3, eff. May 12, 2009; Laws 2010, c. 64, § 2, eff. March 22, 2010.

HISTORICAL AND STATUTORY NOTES

Composite section by the Office of Legislative Research and General Counsel of Laws 2006, c. 8, § 4 and Laws 2006, c. 30, § 1.

CROSS REFERENCES

Arrest of school employee, notice required, see § 53-10-211.
Attempt, elements and classification, see §§ 76-4-101 and 76-4-102.
Conspiracy and solicitation, elements and penalties, see § 76-4-201 et seq.
DUI, conviction defined, see § 41-6a-502.
Fines upon conviction of misdemeanor or felony, see § 76-3-301.
Inchoate offenses, limitations on sentencing, see §§ 76-4-301 and 76-4-302.
Minors, suspension of driver's license for certain offenses, see § 78A-6-606.
Penalties for felonies, see § 76-3-203.
Penalties for misdemeanors, see § 76-3-204.
Right to trial by jury, see Const. Art. 1, § 10.
Vehicles subject to seizure and impoundment by peace officers, see § 41-6a-527.

LIBRARY REFERENCES

West's Utah Code Annotated Currentness
Title 58. Occupations and Professions
Chapter 37A. Utah Drug Paraphernalia Act (Refs & Annos)
§ 58-37a-3. "Drug paraphernalia" defined

As used in this chapter, "drug paraphernalia" means any equipment, product, or material used, or intended for use, to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, conceal, inject, ingest, inhale, or to otherwise introduce a controlled substance into the human body in violation of Title 58, Chapter 37, Utah Controlled Substances Act, and includes, but is not limited to:

(1) kits used, or intended for use, in planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) kits used, or intended for use, in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance;

(3) isomerization devices used, or intended for use, to increase the potency of any species of plant which is a controlled substance;

(4) testing equipment used, or intended for use, to identify or to analyze the strength, effectiveness, or purity of a controlled substance;

(5) scales and balances used, or intended for use, in weighing or measuring a controlled substance;

(6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannited, dextrose and lactose, used, or intended for use to cut a controlled substance;

(7) separation gins and sifters used, or intended for use to remove twigs, seeds, or other impurities from marihuana;

(8) blenders, bowls, containers, spoons and mixing devices used, or intended for use to compound a controlled substance;

(9) capsules, balloons, envelopes, and other containers used, or intended for use to package small quantities of a

controlled substance;

(10) containers and other objects used, or intended for use to store or conceal a controlled substance;

(11) hypodermic syringes, needles, and other objects used, or intended for use to parenterally inject a controlled substance into the human body; and

(12) objects used, or intended for use to ingest, inhale, or otherwise introduce a controlled substance into the human body, including but not limited to:

(a) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) water pipes;

(c) carburetion tubes and devices;

(d) smoking and carburetion masks;

(e) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(f) miniature cocaine spoons and cocaine vials;

(g) chamber pipes;

(h) carburetor pipes;

(i) electric pipes;

(j) air-driven pipes;

(k) chillums;

(l) bongs; and

(m) ice pipes or chillers.

West's Utah Code Annotated Currentness
Title 58. Occupations and Professions
Chapter 37A. Utah Drug Paraphernalia Act (Refs & Annos)
§ 58-37a-4. Considerations in determining whether object is drug paraphernalia

In determining whether an object is drug paraphernalia, the trier of fact, in addition to all other logically relevant factors, should consider:

(1) statements by an owner or by anyone in control of the object concerning its use;

(2) prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to a controlled substance;

(3) the proximity of the object, in time and space, to a direct violation of this chapter;

(4) the proximity of the object to a controlled substance;

(5) the existence of any residue of a controlled substance on the object;

(6) instructions whether oral or written, provided with the object concerning its use;

(7) descriptive materials accompanying the object which explain or depict its use;

(8) national and local advertising concerning its use;

(9) the manner in which the object is displayed for sale;

(10) whether the owner or anyone in control of the object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(11) direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(12) the existence and scope of legitimate uses of the object in the community; and

(13) expert testimony concerning its use.

CREDIT(S)

Laws 1981, c. 76, § 4.

LIBRARY REFERENCES

Controlled Substances 42.
Westlaw Key Number Search: 96Hk42.

NOTES OF DECISIONS

Probable cause 2
Validity 1

1. Validity

Commercial free speech rights of owners of stores that sold smoking accessories were not infringed by provisions of Utah Drug Paraphernalia Act prohibiting advertising. U.C.A. 1953, 58-37a-4, 58-37a-5. Murphy v. Matheson, 1984, 742 F.2d 564. Constitutional Law 1645; Controlled Substances 6

Even if Utah Drug Paraphernalia Act implicated noncommercial speech, any effect on expression of ideas would be minimal and thus would not violate overbreadth doctrine requirement that to be overbroad a statute must reach a substantial amount of constitutionally protected conduct. U.C.A. 1953, 58-37a-4, 58-37a-5; U.S.C.A. Const.Amends. 1, 14. Murphy v. Matheson, 1984, 742 F.2d 564. Controlled Substances 6

Provision of Utah Drug Paraphernalia Act setting out "logically relevant factors" to be considered by trier of fact in determining whether an object is drug paraphernalia was not unconstitutionally vague. U.C.A. 1953, 58-37a-4; U.S.C.A. Const.Amends. 5, 14. Murphy v. Matheson, 1984, 742 F.2d 564. Controlled Substances 6

2. Probable cause

Officer reasonably believed that defendant's use of needles and syringes was illegal, such that officer had probable cause to arrest defendant; store employee reported that woman had been observed on security camera and that she was injecting herself with heroin, and when officer arrived, the woman was still injecting herself, thereby corroborating tip received from employee, and employee's further tip that defendant and his companion had been with the woman and were still at the location led to reasonable inference that the men were observed on camera in close proximity in space with woman shortly before officer arrived, and when defendant removed syringes from his pocket, officer noticed that they were not accompanied by medicine, and defendant's syringes

West's Utah Code Annotated Currentness
Title 58. Occupations and Professions
Chapter 37A. Utah Drug Paraphernalia Act (Refs & Annos)
§ 58-37a-5. Unlawful acts

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act. [FN1] Any person who violates this subsection is guilty of a class A misdemeanor.

(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4)(a) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia.

(b) Any person who violates this Subsection (4) is guilty of a class B misdemeanor.

(5) A person may be charged and sentenced for a violation of this section, notwithstanding a charge and sentence for a violation of any other section of this chapter.

CREDIT(S)

Laws 1981, c. 76, § 5; Laws 2008, c. 295, § 3, eff. May 5, 2008.

[FN1] Laws 1981, c. 76, that enacted this chapter.

CROSS REFERENCES

C

West's Utah Code Annotated Currentness
Title 76. Utah Criminal Code
Chapter 1. General Provisions (Refs & Annos)
Part 4. Multiple Prosecutions and Double Jeopardy
§ 76-1-402. Separate offenses arising out of single criminal episode--Included offenses

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall

determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

CREDIT(S)

Laws 1973, c. 196, § 76-1-402; Laws 1974, c. 32, § 2.

CROSS REFERENCES

Rights of accused persons, generally, see Const. Art. 1, § 12.
Rights of defendant, see § 77-1-6.

LIBRARY REFERENCES

Criminal Law 29, 620.
Double Jeopardy 138, 139, 161.
Westlaw Key Number Searches: 110k29; 110k620; 135Hk138; 135Hk139; 135Hk161.
C.J.S. Criminal Law §§ 14, 248, 251 to 253, 255, 260 to 263, 266 to 267, 558 to 561.
C.J.S. Larceny §§ 53 to 54.

RESEARCH REFERENCES

ALR Library

39 A.L.R.5th 283, Seizure or Detention for Purpose of Committing Rape, Robbery, or Other Offense as Constituting Separate Crime of Kidnapping.

UNITED STATES SUPREME COURT

Double jeopardy,

In general,
Civil commitment of sexually violent offenders, retroactive effect, see Kansas v. Hendricks, U.S.Kan.1997, 117 S.Ct. 2072, 521 U.S. 346.
Civil confinement of sexually violent predators, punitive as applied, ex post facto and double jeopardy claims, see Seling v. Young, U.S.Wash.2001, 121 S.Ct. 727, 531 U.S. 250.
Findings in juvenile proceedings, exceptions by state, double jeopardy, see Swisher v. Brady, U.S.Md.1978, 98 S.Ct. 2699, 438 U.S. 204, 57 L.Ed.2d 705.
Granting of demurrer as acquittal, appeal by state barred, see Smalis v. Pennsylvania, U.S.Pa.1986, 106 S.Ct. 1745, 476 U.S. 140, 90 L.Ed.2d 116, on remand 511 Pa. 229, 512 A.2d 634.
Habeas corpus, double jeopardy, motion for directed verdict of acquittal on first-degree murder charge, sufficiency of state court judge's comments to terminate jeopardy, see Price v. Vincent, U.S.Mich.2003,